

**Shankar a/l Ram Pohumall @ Shankar RP Asnani & Anor v  
Jeffery Law Siew Su & Ors**

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HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO  
KG-24-395 OF 2009-II  
RHODZARIAH BUJANG JC  
12 APRIL 2010

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*Civil Procedure — Mode of commencement — Originating summons — Action by solicitors to discharge themselves and to enforce their written retainer — Action commenced by way of originating summons — 14 affidavits filed — Dispute turning solely on construction of written retainer — Whether to be converted to writ action*

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*Civil Procedure — Originating summons — Whether correct originating process used — Action by solicitors to discharge themselves and to enforce their written retainer — Action commenced by way of originating summons — 14 affidavits filed — Dispute turning solely on construction of written retainer — Whether to be converted to writ action*

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The first defendant had engaged the plaintiffs' legal firm to pursue an action against a company. A written retainer was signed for what was stated as an unrefundable fee of RM200,000. Subsequently, relations between counsel and client soured and the plaintiffs wanted to discharge themselves from acting for the defendants and to enforce their retainer and entitlement to all other costs for pursuing two appeals to the Court of Appeal including the cost of engaging a third counsel, a Singapore lawyer. By an originating summons, the plaintiffs applied for the following declaratory reliefs: (a) they were entitled to be discharged as solicitors acting for the defendants in the civil suit; (b) to enforce their retainer and to keep the RM200,000 fees paid in the civil suit regardless of their discharge; and (c) to enforce their retainer and be paid costs on a full indemnity basis as between a solicitor and client in the two civil appeals. The plaintiffs' case was founded upon s 15 of the Advocates Ordinance (Sarawak Cap 110) ('Ordinance'). The defendants disputed the claim on the grounds that there existed a collateral agreement between the first defendant and the first plaintiff that he would refund the RM200,000 if the interlocutory injunction was not granted. The defendants filed six affidavits in opposition to the application and including the plaintiffs' affidavits, altogether 14 affidavits were filed. As such, the defendants applied for the action to be converted into a writ action on the ground that there were substantial disputes of facts and law which can only be properly decided at a trial. The plaintiffs claimed that their claim was based on a written retainer

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A which must, under the Ordinance be in writing and thus no oral agreement was admissible under the said section and under s 92 of the Evidence Act 1950 to contradict the terms of that agreement.

**Held**, dismissing the defendants' application with costs:

- B (1) This case revolved around the construction of an agreement and in normal situation, such a case as this is properly instituted by way of an originating summons (see para 9).
- C (2) The word 'suit' in s 15 recognises that court actions be commenced by way of writ of summons, originating summons, originating motion and petition. The word 'suit' in s 15 is a generic term which therefore must be given a purposive interpretation. Action here cannot just refer to an originating summons for it is an entrenched rule of civil procedure that substantial disputes of facts be settled by way of a writ action.
- D Therefore, it is not to say that all actions to enforce a retainer must be begun by originating summons. It still depends on the degree of factual disputes in the case to warrant such usage of the procedure (see paras 10–12).
- E (3) This was a suitable case to be decided by way of an originating summons. Whatever entitlement to fees of the plaintiffs must only be decided from the written retainer signed by the first defendant. Oral evidence was inadmissible to interpret the written retainer given the clear and express provisions of s 15 of the Ordinance (see para 13).
- F (4) The dispute of the parties turned solely on the issue of the written retainer. Viewed from that perspective matter the voluminous affidavits filed by them, the right of the parties was solely to be gathered within the four corners of the agreement. Any judge tasked to hear the originating summons would be able to decide based on affidavit evidence how those rights should be interpreted (see para 14).
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**[Bahasa Malaysia summary]**

- H Defendan pertama telah melantik firma guaman plaintiff untuk mengambil tindakan terhadap sebuah syarikat. Retainer bertulis ditandatangani untuk apa yang telah dinyatakan sebagai fi yang tidak boleh dikembalikan sebanyak RM200,000. Kemudiannya, hubungan antara peguam dan anak guam menjadi tidak baik dan plaintiff-plaintif mahu dilepaskan daripada bertindak untuk defendan-defendan dan menguatkuasakan retainer mereka dan hak kepada kos-kos lain dalam meneruskan dua rayuan ke Mahkamah Rayuan.
- I termasuk kos melantik peguamcara ketiga, peguamcara Singapura. Melalui saman pemula, plaintiff-plaintif memohon relief perisytiharan berikutnya: (a) mereka berhak dilepaskan sebagai peguamcara yang bertindak bagi pihak defendan-defendan dalam guaman sivil; (b) untuk menguatkuasakan retainer mereka dan menyimpan fi RM200,000 yang dibayar dalam guaman sivil

tanpa mengambilkira pelepasan mereka; dan (c) untuk menguatkuasakan retainer mereka dan dibayar kos indemniti sepenuhnya seperti di antara peguamcara dan anakguaman di dalam dua rayuan sivil. Kes plaintif adalah berdasarkan s 15 Ordinan Peguam Bela (Sarawak Cap 110) ('Ordinan'). Defendan-defendan mempertikaikan tuntutan atas alasan-alasan bahawa terdapat perjanjian kolateral di antara defendan pertama dan plaintif pertama bahawa dia akan mengembalikan RM200,000 tersebut jika injunksi interlokutori tidak diberikan. Defendan-defendan memfailkan enam affidavit menentang permohonan tersebut dan termasuk affidavit-affidavit plaintif, kesemuanya 14 affidavit telah difailkan. Oleh itu, defendan-defendan memohon untuk tindakan tersebut ditukarkan kepada tindakan writ atas alasan bahawa terdapat pertikaian fakta dan undang-undang yang substansial yang mana hanya boleh diputuskan secara betul semasa perbicaraan. Plaintif-plaintif menuntut bahawa tuntutan mereka adalah berdasarkan retainer bertulis yang mana, di bawah Ordinan mesti dalam bentuk bertulis dan oleh itu tiada perjanjian lisan boleh diterima di bawah seksyen tersebut dan di bawah s 92 Akta Keterangan 1950 untuk menyangkal terma-terma perjanjian tersebut.

**Diputuskan,** menolak permohonan defendan-defendan dengan kos:

- (1) Kes ini berkisar sekitar tafsiran perjanjian dalam keadaan biasa, kes seperti ini dimulakan secara betul melalui saman pemula (lihat perenggan 9).
- (2) Perkataan 'suit' di dalam s 15 mengambilkira bahawa tindakan mahkamah dimulakan melalui writ saman, saman pemula, usul pemula dan petisyen. Perkataan 'suit' di dalam s 15 adalah terma generik yang mana mesti diberikan tafsiran maksud. Tindakan di sini tidak boleh merujuk kepada saman pemula kerana ia adalah peraturan kukuh prosedur sivil bahawa pertikaian fakta yang substansial diselesaikan melalui tindakan writ. Oleh itu, tidak boleh dikatakan bahawa kesemua tindakan untuk menguatkuasakan retainer mesti dimulakan melalui saman pemula. Ia masih bergantung kepada tahap pertikaian faktual dalam kes untuk mewajarkan penggunaan prosedur tersebut (lihat perenggan 10–12).
- (3) Kes ini sesuai diputuskan melalui saman pemula. Apa-apa hak plaintif-plaintif hanya boleh diputuskan daripada retainer bertulis yang ditandatangani oleh defendan pertama. Keterangan lisan tidak diterima untuk mentafsirkan retainer bertulis memandangkan peruntukan s 15 Ordinan yang jelas dan nyata (lihat perenggan 13).
- (4) Pertikaian pihak-pihak berkisar semata-mata atas isu retainer bertulis. Melihat daripada perspektif tersebut dan affidavit yang banyak yang difailkan oleh mereka, hak pihak-pihak disimpulkan daripada keempat-empat penjurur perjanjian semata-mata. Mana-mana hakim

- A yang ditugaskan untuk mendengar saman pemula boleh memutuskan berdasarkan keterangan affidavit sebagaimana hak-hak tersebut patut ditafsirkan (lihat perenggan 14).]

**Notes**

- B For a case on whether correct originating process used, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 4824.  
For cases on originating summons, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4810–4817.

**C Cases referred to**

*Hirst & Capes, In re* [1908] 1 KB 982, CA (refd)  
*Hirst & Capes & Anor v Fox & Ors* [1908] AC 416, HL (refd)  
*National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211, FC (refd)

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**Legislation referred to**

Advocates Ordinance of Sarawak (Cap 110) s 15  
Evidence Act 1950 s 92

- E Rules of the High Court 1980  
Solicitors Act 1957

*Shankar Ram (Francis Teron Kadap wit him) (Thomas, Shankar Ram & Co) for the plaintiffs.*

- F *Lim Heng Choo (Anthony Tai with him (Anthony Tai Advocates)) (Lim & Lim Advocates) for the defendants.*  
*Sunny Si (Si & Associates Advocates) watching brief for Insurers (Hong Leong Assurance Bhd).*

**G Rhodzariah Bujang JC:**

RULING (ENCL 99)

- H [1] By an originating summons dated 28 October 2009, the plaintiffs are applying for a number of declaratory reliefs pertaining to their conduct and entitlements as solicitors on record acting for the defendants in a civil suit and two appeals (to the Court of Appeal) flowing therefrom.

[2] The plaintiffs both seek to declare that:

- I (a) they are entitled to be discharged as solicitors acting for the defendants in the civil suit;  
(b) to enforce their retainer and to keep the RM200,000 fees paid in the civil suit regardless of their discharge; and

- (c) to enforce their retainer and be paid costs on a full indemnity basis as between a solicitor and client in the two civil appeals.

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[3] This application has been met with very serious objections by the defendants who have filed six affidavits in opposition to the application and including the plaintiffs' affidavits, altogether 14 affidavits have been filed in this case. In this given scenario, the defendants have filed an application dated 7 January 2010 for this action to be converted into a writ action on the ground that there are substantial disputes of facts and law which can only be properly decided at a trial; not by affidavits.

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#### CONVERSION OF THE ACTION

[4] If I take the stand that the factual disputes in this case are substantial and that they cannot be resolved on the affidavit evidence alone, my duty of course is to make an order that the defendants' application for conversion be allowed.

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[5] Reduced to its basic, the dispute between the parties is simply this.

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[6] The plaintiffs said the first defendant had engaged their legal firm to, inter alia, pursue an action against a company, Rich Efficient Wood Industries Sdn Bhd, the particulars of which are not relevant here. A written retainer was signed for what was stated as an unrefundable fee of RM200,000 (exh SR1 to the plaintiffs' affidavit in support) and other fees stipulated therein for the conduct of the said actions. A suit was indeed filed with the three present defendants as the plaintiffs. There were two interlocutory applications filed in that suit action, one of which was for an interim injunction which was granted but was dismissed when heard inter partes. The two decisions of the High Court in respect of these applications had been disposed by the Court of Appeal on 15 October 2009. Relations between counsels and client have since then soured and the plaintiffs now want to discharge themselves from acting for the defendants and to enforce their retainer and entitlement to all other costs for pursuing the two appeals including the cost of engaging a third counsel, a Singapore lawyer by the name of Muthu Kumaran. The defendants disputed the plaintiffs' entitlement to RM200,000 and fees on the grounds that there existed a collateral agreement between the first defendant and the first plaintiff that he would refund the RM200,000 if the interlocutory injunction was not granted. They disputed the engagement of the Singaporean lawyer and the legality of his employment here whilst the plaintiffs said the first defendant knew from the start that his services would be engaged in view of the urgency of the brief given to them, particularly, the need to obtain the injunction against Rich Efficient Wood Industries Sdn Bhd.

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A SECTION 15 OF THE ADVOCATES ORDINANCE

B [7] It is without doubt that the plaintiffs' case is founded upon s 15 of the Advocates Ordinance (Sarawak Cap 110). I could not have missed this point for the submission of the plaintiffs contained colourful highlights and big font size to attract my attention to it (and a whole lot of other points besides it). The defendants' counsels themselves agree that this is so for they are also using this provision to defeat the plaintiffs' own case. But first I reproduce the section.

C 15

D (1) *No agreement* entered into by any advocate (which terms shall in this section include a person entitled to appear and plead before the Federal Court by virtue of subsection (2) of section 8 and any person referred to in paragraph (b) or (p) of section 10) with any person retaining or employing him, respecting the amount and manner of payment for the whole, or any part of, any past or future services, fees, charges, or disbursements in respect of business done, or to be done, by such advocate, *shall be valid unless it is made in writing signed by such person.*

E (2) When *a suit* is brought to enforce any such agreement, if the agreement is not proved to be fair and reasonable, the court may reduce the amount payable thereunder, or order it to be cancelled and the costs, fees, charges and disbursement, in respect of the business done, to be ascertained in the same manner as if no such agreement had been made.

F (3) *Such an agreement shall exclude any further claim of the advocate, beyond the terms of the agreement*, with respect to any services, fees, charges or disbursements in relation to the conduct and completion of the business in respect of which the agreement is made, except such services, fees, charges or disbursements, if any, as are expressly excepted by the agreement.

G (4) A provision in any such agreement that the advocate shall not be liable for negligence, or that he shall be relieved from any responsibility to which he would otherwise be subject as such advocate, shall be wholly void. (Emphasis added.)

H [8] The plaintiffs are saying that their case being one which is based merely on a written retainer which must, under the Ordinance be in writing, no oral agreement is admissible under the said section and under s 92 of the Evidence Act 1950 to contradict the terms of that agreement. The defendants' counsels in turn said by the clear use of the word 'suit' in this provision, the plaintiffs' mode of beginning this action by originating summons is wrong and their application must be allowed.

I [9] First, I agree that the issue in this case revolves around the construction of an agreement and in normal situation, such a case as this is properly

instituted by way of an originating summons. The Federal Court in *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 has made this position clear.

[10] Secondly, the word 'suit' in s 15 is not to be given a literal meaning as ascribed by the defendants' counsel because the Rules of the High Court 1980 which regulates procedure in civil actions does not recognise 'suit' as an action by itself. It recognises that court actions be commenced by way of writ of summons, originating summons, originating motion and petition. The word 'suit' in s 15 is a generic term which therefore must be given a purposive interpretation to mean 'any proceeding by one person or persons against another or others in a court of justice in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or in equity' (see *Black's Law Dictionary* (5th Ed) at p 1286).

[11] Thirdly, the plaintiffs' reliance on English position of enforcing a retainer under the Solicitors Act 1957 and quoting *Cordery's Law Relating To Solicitors* is fine except that in the same book on the same page and just beneath the highlighted portion where the procedure by way of originating summons is given, is the learned author's view, citing the Court of Appeal's case *In re Hirst & Capes* [1908] 1 KB 982 (and affirmed by the House of Lords, which judgment is reported in *Hirst & Capes & Anor v Fox & Ors* [1908] AC 416) that where the existence of the agreement is questioned it may still be proper to apply for the determination of it in an action. Action here cannot just refer to an originating summons for it is an entrenched rule of civil procedure that substantial disputes of facts be settled by way of a writ action.

[12] Therefore, it is not to say that all actions to enforce a retainer must be begun by originating summons. It still depends on the degree of factual disputes in the case to warrant such usage of the procedure.

[13] Fourthly, and finally, I say that based on my examination of the affidavit evidence particularly in relation to the issue of the engagement of the Singapore lawyer and the agreement on the plaintiffs' entitlement on the fees in the civil appeals, this is a suitable case to be decided by way of an originating summons. Why I say so is because whatever entitlement to fees of the plaintiffs be it the RM200,000, the fees in respect of the two appeals and that of the Singapore lawyer, must only be decided from the written retainer signed by the first defendant, borne out by their own contention, which I agree, that oral evidence is inadmissible to interpret the written retainer given the clear and express provisions of s 15 of the Ordinance. The third defendant in this case had in a separate action suit No 22-229 of 2009-I sued the

- A present first plaintiff for a refund of the RM200,000 and a further sum of RM795,903.33 which was the amount of the claim in the suit against Rich Efficient Wood Industries Sdn Bhd. YA Tuan Ravinthran N Paramaguru had struck out that claim ruling that the alleged oral agreement that the RM200,000 was refundable was champertous and therefore illegal. His Lordship also ruled that the RM200,000 fees paid was non refundable. The plaintiffs have filed a supplementary affidavit to highlight this decision to me which the defendants' counsel had objected to.

- C [14] I do not need that affidavit to draw my attention to the judgment as I do know for a fact that the decision was made as I was the one who fixed that striking out application for hearing before YA Tuan Ravinthran N Paramaguru and have been appraised by him of the date of decision and after it was delivered, the grounds of his judgment had been uploaded on our court's website for all to read. I share His Lordship's view that the dispute of the parties turn solely on the issue of the written retainer. Viewed from that perspective — no matter the voluminous affidavits filed by them, the right of the parties is solely to be gathered within the four corners of the agreement. I think that any judge tasked to hear the originating summons would be able to decide based on affidavit evidence how those rights should be interpreted.

- E [15] In the circumstances, I dismiss the defendants' application for conversion of the action with costs to be taxed unless agreed.

- F *Defendants' application dismissed with costs.*

Reported by Kanesh Sundrum

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